(2)

Supreme Court, U.S.
FILED
FEB 5 1997
CLERK

No. 96-1054

In The

Supreme Court of the United States

October Term, 1996

SIDNEY P. SANDERS JR.,

Petitioner,

vs.

ARNESON PRODUCTS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BRIAN T. MCMILLAN
Counsel of Record
ROBERT J. WILGER

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
50 West San Fernando Street, Suite 1400
San Jose, California 95113
Telephone: (408) 998-4150

Attorneys for Respondent Arneson Products, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

56 pp

QUESTIONS PRESENTED

1. Is a person "disabled" for purposes of establishing a *prima facie* case of discrimination pursuant to the Americans with Disabilities Act, 42 U.S.C. section 12101, *et seq.*, where the person admits his or her alleged "disability" is non-chronic, temporary, of short-term duration and with no lasting residual effects?

2. Is a person a "qualified individual with a disability" for purposes of establishing a *prima facie* case of discrimination pursuant to the Americans with Disabilities Act, 42 U.S.C. section 12101, *et seq.*, where the person concedes that he or she was completely unable to perform any aspect of his or her job for a period of nearly six months, including at the time of his or her termination?

3. Can a plaintiff proceed on his or her state-law claim for wrongful termination in violation of public policy when the defendant did not violate, as a matter of law, the statute forming the basis of the plaintiff's wrongful termination claim?

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Respondent Arneson Products, Inc., hereby makes the following corporate disclosure statement:

Respondent Arneson Products, Inc., is a wholly owned subsidiary of its parent corporation, Hayward Industries, Inc. Respondent Arneson Products, Inc., does not have any subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARENT COMPANIES AND SUBSIDIARIES ii

TABLE OF AUTHORITIES v

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 5

I. THE PETITION FAILS TO RAISE IMPORTANT LEGAL ISSUES 5

A. The Petition Does Not Raise An Important Federal Statutory Issue 5

1. The Ninth Circuit Court Of Appeals Correctly Held That The Americans With Disabilities Act Does Not Protect Persons with Temporary Non-Chronic Conditions 5

2. The Ninth Circuit Court of Appeals Did Not Err When It Failed To Find That Petitioner Suffered From A Characteristic Manifestation Of An Underlying Disability Because He Repeatedly Conceded He Suffered From Two Distinct Disabilities 7

TABLE OF CONTENTS – Continued

Page

3. The Ninth Circuit Court of Appeals' Decision Does Not Leave Disabled Employees Unprotected Under The Law Because The Family And Medical Leave Act Protects Employees With Temporary Conditions Who Must Take a Short-Term Leave of Absence 8

B. The Petition Does Not Identify Any Conflict Between The Ninth Circuit Court Of Appeals And The Supreme Court Or Another Circuit 9

II. THE PETITION ONLY SEEKS REVIEW OF A FACTUAL ISSUE UNIQUE TO THIS CASE.. 10

A. This Court Should Not Grant A Petition For Certiorari To Review Evidence..... 10

B. The Ninth Circuit Correctly Found That Petitioner's Psychological Condition Was A Distinct Disability Because Petitioner Conceded Before Both Lower Courts That He Suffered From Two Distinct Disabilities 11

III. THE PETITION IMPROPERLY REQUESTS THIS COURT TO ADDRESS QUESTIONS THAT WERE NOT TIMELY RAISED BELOW 15

CONCLUSION 16

APPENDIX CONTENTS

Relevant Sections From the Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. Section 1630.1, *et seq.*.....A1

Relevant Sections from the Family and Medical Leave Act, 29 U.S.C. Section 2601, *et seq.* A17

TABLE OF AUTHORITIES

Page(s)

CASES

Duignan v. United States, 274 U.S. 195 (1927) 16

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 11

Hamm v. Runyon, 51 F.3d 721 (7th Cir. 1995) 10

McDonald v. Commonwealth of Pa., Dep't of Pub. Welfare, 62 F.3d 92 (3d Cir. 1995) 10

Rogers v. International Marine Terminals, Inc., 87 F.3d 755 (5th Cir. 1996) 10

Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996) 10

United States v. Doe, 465 U.S. 605 (1984) 15

United States v. Johnston, 268 U.S. 220 (1925) 10

United States v. Williams, 504 U.S. 36 (1992) 15

STATUTES, RULES AND REGULATIONS

29 C.F.R. Part 1630, App., § 1630.2(j) 6

29 C.F.R. § 1630.1, *et seq.* 1

29 C.F.R. § 1630.2(j)(2) 6

29 U.S.C. § 2601, *et seq.* 1, 8

29 U.S.C. § 2601(a)(4) 8

29 U.S.C. § 2601(b) 8

29 U.S.C. § 2612 9

29 U.S.C. § 2615(a) 9

42 U.S.C. § 12101, *et seq.* ..... i, 1

42 U.S.C. § 12102(2)(A) 5

Federal Rules of Civil Procedure

Rule 56 3

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statute involved in this case is the Americans with Disabilities Act ("ADA"), 42 U.S.C. section 12101, *et seq.* (Petition E-1 through E-21), and its implementing regulations, 29 C.F.R. section 1630.1, *et seq.* (Appendix A1 through A16).

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. section 2601, *et seq.*, also is relevant to this case. The pertinent sections are set out in the Appendix, *infra*, at pages A17 through A33.

STATEMENT OF CASE

Respondent Arneson Products respectfully opposes the Petition for Writ of Certiorari. The Petition fails to raise any important legal issues deserving this Court's attention. Furthermore, Petitioner simply asks this Court to review the lower courts' factual findings. Such a review wastes this Court's limited resources because the lower courts applied the appropriate law to this matter's unique facts and correctly concluded that Petitioner cannot establish a *prima facie* case of disability discrimination under the ADA.

In October of 1991, Respondent Arneson Products began a wide-scale consolidation and reorganization of its manufacturing operations. These changes resulted in significant layoffs and the redistribution of duties among the remaining workforce. Petitioner's duties, as the Company's Productions Manager, were particularly impacted

and included the elimination of all purchasing responsibilities.

In June of 1992, while this restructuring was underway, Petitioner began suffering medical problems. He was diagnosed with a bladder tumor in October of 1992. On October 26, 1992, Respondent allowed Petitioner to go on a fully-paid disability leave for surgery and subsequent recovery. During his absence, Petitioner's duties were redistributed to the existing workforce.

Petitioner was originally scheduled by his doctor to return to work on November 30, 1992. When he was unable to do so, the Company extended Petitioner's leave of absence to December 2, 1992. Petitioner then returned to work but was unable to work on a full-time basis. Respondent permitted Petitioner to work part-time, which accommodated his post-operative treatment.

After a mere two and one-half weeks of part-time work (*i.e.*, from December 2 to December 19, 1992), Petitioner was diagnosed by his psychologist as suffering from a temporary stress disorder. Petitioner's psychologist described the condition as a temporary "adjustment disorder with mixed emotional features." (E.R. 325.) Petitioner was given yet another leave of absence – this time for his temporary "emotional" problems. Although Petitioner did not know when he would be able to return to work, Respondent granted Petitioner an additional leave of absence. As with all his prior leaves, Petitioner continued to receive his full salary while he was on the leave of absence for his temporary psychological condition. Petitioner's duties continued to be performed by the remaining supervisors.

Around January 1, 1993, Petitioner informed Respondent that he expected to return to work on March 1, 1993. However, on February 26, 1993, two days prior to his anticipated return to work, Petitioner informed Respondent that he would not be returning to work on that date and did not know when he could return to work. (E.R. 155.) Respondent continued to reorganize its operations and implement additional layoffs. Determining that Petitioner's duties were adequately being performed by the existing workforce, Petitioner's Production Manager position was eliminated.

Thereafter, on or about March 9, 1993, Respondent received a note from Petitioner's psychologist stating that Petitioner would be able to return to work on April 5, 1993. Although Respondent had already eliminated Petitioner's position and terminated his employment, it agreed to continue to pay Petitioner his full salary through April 5, 1993, when his temporary psychological condition was expected to end.

Petitioner filed a Complaint in this matter on February 16, 1994, in the United States District Court for the Northern District of California, which included a claim for violation of the ADA and a related state law claim for violation of public policy.

On January 11, 1995, Respondent Arneson Products filed a Motion for Summary Judgment and/or Adjudication of Issues pursuant to Federal Rule of Civil Procedure 56. A hearing on Respondent's Motion was held on February 9, 1995, before the Honorable Stanley A. Weigel. Judge Weigel issued an order granting Respondent's

motion as to all of Petitioner's pending claims. (Petition, Appendix D.)

On February 13, 1995, Petitioner filed a Notice of Appeal with the Ninth Circuit Court of Appeals. On May 13, 1996, the hearing on Petitioner's appeal was held before the Honorable Arthur L. Alarcon, Robert R. Beezer and Pamela Ann Rymer. The Court of Appeal issued its opinion on August 6, 1996, affirming the District Court's Order dismissing Petitioner's claims. (Petition, Appendix A.)

Petitioner then filed with the Ninth Circuit a Petition for Rehearing and A Suggestion for Rehearing *En Banc* on August 20, 1996. Judges Alarcon, Beezer and Rymer, on September 30, 1996, voted unanimously to deny the Petition and no other judge requested a vote to rehear the matter *en banc*. (Petition, Appendix B.) The Petition to this Court was thereafter filed on December 30, 1996.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION FAILS TO RAISE IMPORTANT LEGAL ISSUES.

A. The Petition Does Not Raise An Important Federal Statutory Issue.

1. The Ninth Circuit Court Of Appeals Correctly Held That The Americans With Disabilities Act Does Not Protect Persons with Temporary Non-Chronic Conditions.

Petitioner does not dispute the legal basis of the Ninth Circuit's decision. He effectively concedes that the legal foundation for the opinion is consistent with established law by not questioning the legal conclusion that persons with non-chronic and temporary medical conditions are not "disabled" as that term is defined by the ADA. In fact, the Ninth Circuit's opinion is well supported by the statute and its implementing regulations.

Not every medical condition is a "disability," which triggers the protection of the ADA. Rather, the ADA only applies to medical conditions "that substantially limit[ ] one or more of the major life activities of the individual." 42 U.S.C. § 12102(2)(A). To determine whether a particular medical condition "substantially limits" a major life activity, a court must analyze three factors:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2). Therefore, as the Ninth Circuit correctly held, the ADA does not protect persons, such as Petitioner, who suffer from "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact." (Petition at A-6, citing 29 C.F.R. Part 1630, App., § 1630.2(j).) Applying these factors, the Ninth Circuit properly held that Petitioner's admittedly temporary psychological condition was not a "disability" as defined by the ADA. (Petition at A-6.)

The Ninth Circuit also correctly noted that the term "disability" has many different definitions depending upon the context used. Therefore, although Respondent repeatedly argued that Petitioner was "totally disabled" at the time of his termination, it did not concede that Petitioner was "disabled" as defined by the ADA. In fact, Respondent expressly argued to the Ninth Circuit that, to the extent Petitioner was claiming his "psychological disability" was temporary, he was not "disabled" under the terms of the ADA. (Appellee's Opposition Brief at 29.)

Petitioner fully conceded before the Ninth Circuit the temporary nature of his psychological affliction. In this regard, Petitioner stated: "Dr. Purviance expected Mr. Sanders' disability to be limited and short-term in nature and that he would quickly recover." (Appellant's Reply Brief at 10.) Therefore, to the extent that Petitioner had a short-term, temporary and non-chronic medical condition, he was not a "qualified individual with a disability" under the ADA and the Ninth Circuit correctly concluded that he could not state a *prima facie* case of disability discrimination as a matter of law. *See* 29 C.F.R. Part 1630, App. § 1630.2(j).

Petitioner's only dispute with the Court of Appeals' decision is that the Ninth Circuit chose to believe that he suffered from two separate disabilities rather than a single disability spanning the six-month period he was unable to work. As noted below, however, this is a factual issue, unrelated to the Court of Appeals' legal holding.

2. The Ninth Circuit Court of Appeals Did Not Err When It Failed To Find That Petitioner Suffered From A Characteristic Manifestation Of An Underlying Disability Because He Repeatedly Conceded He Suffered From Two Distinct Disabilities.

Petitioner contends that the Ninth Circuit Court of Appeals erred when it failed to hold that his alleged temporary "psychological stress condition" was a symptom of his cancer and therefore protected under the ADA. (Petition at 6.) The Court of Appeals never had to make this determination because, as demonstrated below, Petitioner repeatedly conceded before both lower courts that his temporary psychological condition was a distinct disability and should be considered separate from his previous condition. Only now, after his ADA claim was dismissed by the Ninth Circuit does Petitioner argue that his temporary psychological disorder was a "characteristic manifestation" of his cancer and protected by the ADA. The issue was never before the lower courts so they did not err by dismissing Petitioner's claims.

3. The Ninth Circuit Court of Appeals' Decision Does Not Leave Disabled Employees Unprotected Under The Law Because The Family And Medical Leave Act Protects Employees With Temporary Conditions Who Must Take a Short-Term Leave of Absence.

Petitioner argues that the Ninth Circuit's decision will make a "nullity" of the ADA because disabled employees "who develop psychological reactions to their underlying disabilities cannot be fully protected from employment discrimination." (Petition at 5.) This concern is completely unfounded and ignores other laws which offer protection from discrimination of the temporarily disabled.

The ADA was never intended to protect all employees who are temporarily unable to perform the essential functions of their job. Congress specifically addressed the ADA's lack of protection of temporary medical conditions by enacting the Family and Medical Leave Act of 1993. 29 U.S.C. § 2601, *et seq.*

Before the passage of the FMLA, there was no statutory protection for employees who were required to take a leave of absence because they were temporarily unable to perform the essential functions of their jobs. *See* 29 U.S.C. § 2601(a)(4) (Congress found that there was "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods"). As a result, Congress passed the FMLA with the specific intent of giving employees the right to take a leave of absence for temporary medical disabilities. 29 U.S.C. § 2601(b). Furthermore, the FMLA

expressly protects employees from discrimination for taking a leave under the statute. 29 U.S.C. § 2615(a).

Had Congress intended the ADA to apply to all instances when an employee required a leave of absence for a temporary disability, passage of the FMLA would have been unnecessary. Accordingly, the very existence of the specific leave of absence provisions contained in the FMLA evidences congressional intent to exclude from the coverage of the previously-enacted ADA those employees, such as Petitioner, who were unable to perform their job because of a temporary non-chronic medical condition.

Petitioner's argument that the Ninth Circuit's decision leaves the temporarily disabled unprotected from employer reprisals is simply incorrect. Petitioner, himself, acknowledged before the Ninth Circuit that every qualified employee, disabled or not, is entitled to a twelve-week leave of absence in any twelve-month period under the FMLA. 29 U.S.C. § 2612; Appellant's Opening Brief at 32 n.13. The Ninth Circuit's decision does not alter, in any way, this protection of an employee's right to take a leave of absence for a temporary medical or psychological condition.

B. The Petition Does Not Identify Any Conflict Between The Ninth Circuit Court Of Appeals And The Supreme Court Or Another Circuit.

Not only is Petitioner unable to establish that the Ninth Circuit's decision is legally incorrect, he also is unable to provide any citations to decisions by the Supreme Court or other Courts of Appeals with which it

conflicts. In fact, every decision that has addressed the issue has reached the same conclusion – individuals with temporary, non-chronic conditions are not "disabled" under the ADA. *See, e.g., Hamm v. Runyon,* 51 F.3d 721, 725-726 (7th Cir. 1995) (Rehabilitation Act case using ADA analysis); *McDonald v. Commonwealth of Pa., Dep't of Pub. Welfare,* 62 F.3d 92, 95-96 (3d Cir. 1995); *Rogers v. International Marine Terminals, Inc.,* 87 F.3d 755, 759 (5th Cir. 1996); *Roush v. Weastec, Inc.,* 96 F.3d 840, 843-844 (6th Cir. 1996). Therefore, this Court need not grant this Petition to resolve any disputes between the Circuits or between the Circuits and this Court.

II. THE PETITION ONLY SEEKS REVIEW OF A FACTUAL ISSUE UNIQUE TO THIS CASE.

A. This Court Should Not Grant A Petition For Certiorari To Review Evidence.

It is clear that Petitioner is seeking to have this Court only review the factual bases for the lower courts' decisions. As noted above, Petitioner does not dispute the legal grounds for the Ninth Circuit's opinion. Petitioner only argues that the Court of Appeals misconstrued the record when it held that he could not state a *prima facie* case of discrimination under the ADA due to the fact that his temporary "psychological disability" was separate from his cancer and of short duration. (Petition at 6-7.) It is well-settled that the Supreme Court will "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

Moreover, as demonstrated below, there is no factual dispute regarding Petitioner's particular medical condition. Both the District Court and Ninth Circuit correctly concluded, from the unique facts of this case, that Petitioner was not a "qualified individual with a disability" and therefore unable to state a *prima facie* case of discrimination under the ADA. Therefore, this Court should not reexamine the record and should deny the Petition. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

B. The Ninth Circuit Correctly Found That Petitioner's Psychological Condition Was A Distinct Disability Because Petitioner Conceded Before Both Lower Courts That He Suffered From Two Distinct Disabilities.

Obviously recognizing that Respondent repeatedly accommodated his cancer condition, Petitioner, throughout the proceedings before both the District Court and the Court of Appeals, argued that his temporary psychological disorder and his previous cancer condition were two distinct disabilities – the only issue being whether Respondent accommodated his temporary psychological condition. (Appellant's Reply Brief at 9.) In doing so, Petitioner attempted to avoid the obvious conclusion that he was not a "qualified individual with a disability" under the ADA. That is, if Petitioner's two conditions were considered together, Petitioner could not deny that he suffered an affliction, which precluded him from performing any aspect of his job for nearly six months, despite numerous leaves of absence. Petitioner testified at his deposition that "between October 26th, 1992, and April 5, 1993 [he was] unable to perform [his] job except

for the two or three weeks of part-time work in December of '92." (E.R. 163-164.) Further, Petitioner conceded that no accommodation was possible because he could not work, eat, or sleep and was under orders by his psychologist to not even "think [ ] about work." (E.R. 150, 155.)

Only after the Ninth Circuit affirmed the District Court's dismissal of his ADA claim, on the basis that his psychological condition was non-chronic, short-term, temporary, and without any lasting effects and thus fell outside the scope of the ADA, did Petitioner assert that he in fact had only one disability – cancer.

Contrary to his statements to this Court that the record does not support the conclusion that he suffered from two distinct disabilities (Petition at 7), Petitioner's counsel, in fact, repeatedly argued in both his Opening Brief and Reply Brief to the Court of Appeals that he suffered from two disabilities and only his alleged "psychological disability" was not accommodated by Respondent. For example, under the section of his Opening Brief entitled "Arneson's Refusal To Accommodate Sanders' Disability," Petitioner only refers to his "psychological disability" for which he took a "temporary leave" starting December 20, 1992. (Appellant's Opening Brief at 7.) Petitioner did not contend that Respondent failed to accommodate his cancer in this section of his Opening Brief or at any other time in front of the Ninth Circuit.

Thereafter, as demonstrated by the following excerpts from his Opening Brief, Petitioner repeatedly distinguished between his two disabilities and specifically questioned only Respondent's accommodation of his alleged "psychological disability": "the fact that Dr.

Purviance expected Mr. Sanders' psychological disability to last no more than six months does not mean that Mr. Sanders is unprotected by the ADA" (*Id.* at 17); "accommodation to his psychological disability was required" (*Id.* at 22); "Arneson did not accommodate Mr. Sanders' psychological disability" (*Id.* at 25); "Arneson never actually attempted to accommodate Mr. Sanders' psychological disability" (*Id.* at 31); and "Arneson has not shown that it considered or allowed Mr. Sanders any accommodation for his psychological disability." (*Id.* at 33-34.) Again, if Petitioner truly believed he suffered from only one disability, it would have been unnecessary for him to constantly distinguish his alleged "psychological disability" from his cancer.

Moreover, Petitioner continued to distinguish between his two conditions in his Reply Brief to the Ninth Circuit. Specifically, Petitioner stated:

> This is not a case where accommodation for Plaintiff's psychological disability was already attempted and proved unsuccessful. . . . Mr. Sanders was not given any accommodation for his psychological disability. There is no question here of repeated, unlimited leaves of absence for that [cancer] disability. . . . The leave Plaintiff requested for his psychological disability in December, 1992, was the first such leave he requested, not his fourth. . . .

(*Id.* at 9.) Again, Petitioner desperately urged the lower courts to treat his psychological problems as a totally separate "disability" from his cancer to avoid the obvious result that he was not a "qualified individual" under the

ADA in part because he was unable to work for nearly six months despite repeated leaves.

Indeed, Petitioner's appellate Reply Brief is replete with attempts to distinguish his two medical conditions, including the following: "Defendant refused to give Plaintiff any reasonable accommodation for his psychological disability" (*Id.* at 3 n. 3); "no accommodation was made at all of Plaintiff's psychological disability" (*Id.* at 7); and "Mr. Sanders' psychological disability was characterized by an inability to work which lasted only a few months." (*Id.* at 8.) These examples expressly contradict Petitioner's amazing assertions now, to this Court, that he never contended to the Court of Appeals that he suffered from two disabilities.

Finally, as described in his Petition, Petitioner's counsel also repeatedly admitted at oral arguments before the Ninth Circuit that Petitioner suffered from two separate disabilities. (Petition at 8.) First, Petitioner's counsel conceded that the cancer and the emotional distress were two different "things." *Id.* Second, Petitioner's counsel acknowledged that Respondent gave one leave for Petitioner's cancer and another leave for his "psychological disability." *Id.* At no time did Petitioner's counsel tell the Court of Appeals that Petitioner only suffered from one disability and that all of his many leaves of absence were, in fact, for one condition. Only now, after the dismissal of his ADA claim, does Petitioner contend that his temporary psychological condition was so related to his cancer that it should be treated as a single disability.

Given that Petitioner is asking this Court simply to review the record before the District Court and Court of

Appeals to determine if they correctly characterized the nature of his alleged "disability" under the ADA, and because their determination is amply supported, this Court should not grant his Petition for Certiorari. *See United States v. Doe*, 465 U.S. 605, 614 (1984) (Court traditionally "reluctant to disturb findings of fact in which two courts below have concurred").

III. THE PETITION IMPROPERLY REQUESTS THIS COURT TO ADDRESS QUESTIONS THAT WERE NOT TIMELY RAISED BELOW.

The traditional rule of this Court precludes a grant of certiorari when the "question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 40 (1992). Petitioner presents this Court with three questions for review. These three questions were before neither the District Court nor the Ninth Circuit Court of Appeals so that neither court considered them. Upon appeal of the District Court's order, the Ninth Circuit only determined two questions: (1) could Petitioner establish a *prima facie* case of discrimination under the ADA and, if so, did Respondent fail to accommodate his disability; and (2) did the District Court err when it dismissed Petitioner's state-law public policy claim when it held that Petitioner could not establish a *prima facie* case of disability discrimination. To both these questions, the Ninth Circuit answered "no."

Petitioner never raised before the lower courts the issue, found in his first question presented for review, of whether his psychological condition was a symptom of his cancer because he consistently argued to both the

District Court and the Court of Appeals that he suffered from two separate "disabilities."[1] Furthermore, Petitioner never contended that his cancer was not accommodated. In fact, he expressly acknowledged that it was. Therefore, the issue Petitioner now raises concerning his cancer must be deemed waived because the courts below were never faced with the question whether Petitioner was discriminated against because of his cancer. *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed").

Petitioner's third question for review is also inappropriate because there is no dispute that Petitioner's state-law claim for wrongful termination in violation of public policy is dependent upon Petitioner's ability to establish a *prima facie* case of disability discrimination under the ADA. As both lower courts held that Petitioner was not a "qualified individual with a disability," the dismissal of Petitioner's state-law claim was also appropriate.

CONCLUSION

This Petition should be denied. Petitioner fails to raise any important statutory issues. Both the District

[1] In fact, as noted above, it would not have been advantageous for Petitioner to have raised this issue before the lower courts because it is clear that Respondent made no less than four attempts to accommodate Petitioner's cancer during the six-month period of time he was completely unable to perform any aspect of his job.

Court and the Ninth Circuit Court of Appeals correctly applied the ADA, its implementing regulations, and the case law to this matter when they held that Petitioner could not state a *prima facie* case of disability discrimination under the ADA. Furthermore, Petitioner has been unable to identify any split among the Courts of Appeals created by the lower courts' decisions. Moreover, this case rests upon its own unique facts and does not implicate any significant policy. Both lower courts determined that Petitioner was not a "qualified individual with a disability" under the terms of the ADA, given his particular medical condition. Petitioner only disputes this factual holding. Such factual circumstances simply do not raise any issues deserving this Court's consideration through a writ of certiorari.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: February 5, 1997

Respectfully submitted,

BRIAN T. MCMILLAN
Counsel of Record
ROBERT J. WILGER

LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
50 West San Fernando Street,
Suite 1400
San Jose, California 95113
Telephone: (408) 998-4150

Attorneys for Respondent
Arneson Products, Inc.

Part 1630 – Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. § 1630.1, et seq.

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer* – (1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include –

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual –

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits* – (1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working* –

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(See § 1630.3 for exceptions to this definition).

(n) *Essential functions* – (1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal

benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship* – (1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or

others that cannot be limited or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Appendix to Part 1630 – Interpreting Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Part 1630, Appendix.

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long terms or permanent impact, are usually not disabilities. Such

impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, *i.e.*, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to

perform either a particular specialized job or a narrow range of jobs. See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. When compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary

showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (*e.g.*, "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

* * *

Family and Medical Leave Act, 29 U.S.C. § 2601, et seq.

§ 2601. Findings and purposes

(a) Findings

Congress finds that –

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

(Pub.L. 103-3, § 2, Feb. 5, 1993, 107 Stat. 6.)

* * *

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include –

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if

the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer" –

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

(iii) includes any "public agency", as defined in section 203(x) of this title.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means –

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is –

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

(Pub.L. 103-3, Title I, § 101, Feb. 5, 1993, 107 Stat. 7; Pub.L. 104-1, Title II, § 202(c)(1)(A), Jan. 23, 1995, 109 Stat. 9.)

* * *

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on a reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the

employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) of this section may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection

(a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection

(a)(1) of this section is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by the same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

(Pub.L. 103-3, Title I, § 102, Feb. 5, 1993, 107 Stat. 9.)

* * *

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if –

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if –

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than –

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by –

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

(Pub.L. 103-3, Title I, § 104, Feb. 5, 1993, 107 Stat. 12.)

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate

against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

(Pub.L. 103-3, Title I, § 105, Feb. 5, 1993, 107 Stat. 14.)